RECORD AND BRIEFS

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, in her official capacity,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC. in support of the Petitioner and urging reversal

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Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation upon which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First Amendment intended and seek to clarify what the establishment of

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[1] Counsel of Record for Petitioner has consented to this filing through a blanket letter of consent lodged with this Court. Counsel of Record for Respondent has consented through a letter enclosed with this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and its counsel.

religion really means.

SUMMARY OF THE ARGUMENT

Under *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), the heightened antiestablishment provisions of Missouri's Constitution are constrained by the federal constitution's free exercise protections. Furthermore, federal antiestablishment concerns are not implicated by Missouri's Scrap Tire Grant Program. Thus, the Eighth Circuit's contrary conclusion is based on an invocation this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), that ignores the true principles that animated the Framers' views of church-state relations.

Therefore, this Brief will first examine the Framers' understanding of the establishment of religion. Specifically, the Framers distinguished four concepts: the acknowledgment of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In balancing the rights of the religious majority with the rights of religious minorities, the Framers allowed the acknowledgment of religion, the accommodation of religion, and the encouragement of religion; only the establishment of religion was barred.

The Brief will then demonstrate how those concepts have survived in this Court's modern-day Establishment Clause jurisprudence. An application of those concepts demonstrates that the Scrap Tire Grant Program may not even implicate the concepts of acknowledgment, accommodation, and encouragement, and most certainly does protect against an establishment of religion. Indeed, the Scrap Tire Grant Program is the type of program about which Justice Jackson wrote in 1947, "it [is] pretty plain that such a

scheme would not be valid." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

Justice Jackson's 1947 laughable strawman is today's straight-faced enactment. This Court should reverse the Eight Circuit's judgment and declare the Scrap Tire Grant Program unconstitutional as applied to Trinity Lutheran Church.

ARGUMENT

I. NEITHER MISSOURI NOR FEDERAL CONSTITUTIONAL ANTIESTABLISHMENT CONCERNS JUSTIFY EXCLUDING TRINITY LUTHERAN FROM THE SCRAP TIRE GRANT PROGRAM.

As Trinity Lutheran Church has argued, the Eighth Circuit, in affirming the District Court, erred in rejecting Trinity Lutheran's Free Exercise claim. Pet'r Br 10-11. Of special significance is the fact that, as Trinity has also argued, this Court has already held that an antiestablishment concerns raised by Missouri's desire to meet the higher safeguards of its own constitution's No-aid Clause must be addressed without violating the federal Free Exercise Clause: "'the state interest asserted here—in achieving greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.'" Pet'r Br 30 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Thus, Missouri's invocation of its *heightened* antiestablishment concerns has already been rejected by this Court in the context of as-applied Free Exercise (and Equal Protection) claims. *Widmar* at 283-84 (White, J., dissenting); *id.* at 266.

However, it is important to note that *federal* antiestablishment concerns cannot justify Trinity Lutheran's exclusion from the Scrap Tire Grant Program either. These reasons this is so are grounded in history. Given the Eighth Circuit's attention, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015), to this Court's discussion of Establishment Clause history and "hallmarks of an established religion" in *Locke v. Davey*, 540 U.S. 712 (2004), it is the purpose of this Brief to set the relevant historical concepts and to show how they have survived in this Court's current establishment Clause jurisdiction. In so doing, this Brief will demonstrate that, as just stated, the Scrap Tire Grant Program raises no antiestablishment concerns.

A. A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.

One of the animating principles of the Framers' political theory was a concern to balance the rights of the majority and minority in any given situation. For the Framers, this balancing of the rights of the majority and the minority should never be a matter of "either/or"; it must always be a matter of "both/and." Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* one reads, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, one reads that the "fun-

damental maxim of republican government . . . requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception would be if that sense violated the constitutional protection put in place to protect the minority.

The federal Free Exercise and Establishment Clauses show how this balance was achieved in the area of religion. The Framers struck their balance by distinguishing four concepts: the acknowledgment of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledgment, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden. And as the following sections will demonstrate, it is clear that the Scrap Tire Grant Program does not establish religion.

B. True Establishment of Religion is Prohibited.

It is important to remember what the original concept of establishment was all about. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Joseph Story:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it

> creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

With such a definition in mind, it is easier to distinguish acknowledgment, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of the historical examples of acknowledgment, accommodation, and encouragement do not directly parallel the facts of the instant case, it is important to obtain a fairly full-orbed view of these concepts.[2] This Brief will look at each in turn.

C. Acknowledgment of Religion is Permitted.

One of the most historically accurate explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist,

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[2] Further, some of these examples will contain fairly long quotations. These are included to several purposes: to be honest with the primary sources, to give a sense of just how persuasive religious rhetoric and actions were in the founding era (and to give a "flavor" of the former), and to demonstrate by comparison just how far removed the Scrap Tire Grant Program is from a true establishment of religion and likely even from the permitted relationships with the state of acknowledgment, accommodation, and encouragement.

J., dissenting). There one reads the following:

> On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (*citing and quoting* 1 Annals of Cong. 914 (1789)). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J., dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the Thanksgiving proclamation ultimately issued by President Washington:

> Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them

an opportunity peaceably to establish a form of government for their safety and happiness." The Presidential Proclamation was couched in these words:

> Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our sev-

> eral and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting) (*citing and quoting* 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, at 64 (1897)). The opening words of this same Thanksgiving Proclamation are these: "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ." http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Apr. 18, 2016).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

> But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever

> may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse . . . .

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative Power of the States of American Union*, 470-71 (1868) (quoted in *Wallace*, 472 U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the acknowledgment of God Himself, which is in fact, what Washington had done. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (citation omitted).[3]

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[3] This same quotation from Cooley also supports the concept of encouragement that this Brief will address below.

In sum, acknowledgment is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion. Ironically, in the instant case, Missouri has "recognized" Trinity Lutheran's religious status in order to discriminate against it.

D. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

Importantly, this very passage was quoted by Justice O'Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting). In *Flores*, Justices O'Connor and Scalia debated whether Washington's sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally *required*. *Cf. id.* at 560-64 (O'Connor, J., dissenting) with *id.* at 541-44 (Scalia, J., concurring in part). Significantly, that debate is not implicated by the instant case. Rather, Justices O'Connor and Scalia's point of agreement is implicated here: many

historic practices that continue to the present day constitute an accommodation of religion and such accommodation is constitutionally *permitted*. These practices include exemptions from military service and exemptions from oath taking, among others. *Id.* at 560-64 (O'Connor, J., dissenting); *id.* at 541-44 (Scalia, J., concurring in part).

But these accommodations can also involve proactively providing services and opportunities. Classic examples include military, prison, and legislative chaplains.

Like acknowledgment, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do, whether by granting exceptions or providing services that take into account the religious needs of the people. Arguably, accommodation is implicated by the instant case. While some parents may send their children to Trinity Lutheran's Learning Center because it is convenient or because they have heard good things about it, others many send their children their because they have religious convictions that cause them to seek a Christian or a specifically Lutheran environment for daycare or pre-school. Missouri can accommodate those religious convictions by allowing Trinity Lutheran the same access to the Scrap Tire Grant Program as it allows to non-church related daycares and pre-schools.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and

the happiness of mankind, schools and the means of education shall forever be encouraged." http://www.earlyamerica.com/text-northwest-ordinance/ (last visited Apr. 18, 2016).

However, the Founders and Framers did not just talk about encouraging religion; they actually did so. Here one can return to then-Justice Rehnquist's *Wallace v. Jaffree* dissent. There he noted that

> [a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson's treaty:

> The treaty stated in part: "*And whereas,* the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . .

> three hundred dollars, to assist the said Tribe in the erection of a church." From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for propagating the Gospel among the Heathen." The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever . . . ."

Id. at 104 n.5 (Rehnquist, J., dissenting).

While this type of funding would not be permissible under the Missouri Constitution, this Brief has already noted that the *Missouri* restrictions cannot be applied in such a way as to trample Trinity Lutheran's Free Exercise rights. And one cannot imagine such actions, funding, and programs being upheld under this Court's modern jurisprudence, no matter how much the Framers would disagree with that jurisprudence. But the point here is to demonstrate the sharp contrast between the Framers' concept of permissible encouragement and the innocuous program at issue in the instant case.

Encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sect's or individual's request for an accommo-

dation. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the citizenry to engage in religious pursuits. It certainly includes proclamations that encourage such actions. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that "[r]eligion, morality, and knowledge, [are] necessary to good government and the happiness of mankind . . . ." Therefore, government can—and should—encourage religion.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the "history lesson" just set forth is the foundation for an important reality: even though watered down, the concepts of acknowledgment, accommodation, and even encouragement still persist in this Court's Establishment Clause jurisprudence.

For example, the acknowledgment of both God and the role of religion in society continues to be addressed. In *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), this Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. And when this court revisited *Marsh* in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014), it noted that the fact "[t]hat the First Congress provided for the ap-

pointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."

This principle was reiterated in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well in this Court's jurisprudence. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting), Chief Justice Roberts addressed a contemporary example of religious accommodation: "Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice." And this Court has frequent occasion to address Title VII's religious accommodation provisions. *See, e.g.*, practice *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1359 (2015). Religious accommodation was at the heart of the dispute over Patient Protection and Affordable Care Act's contraceptives mandate in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Perhaps this Court's most well-known articulations of accommodation occur in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual

needs."); and in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

And, of course, the accommodation quotation from *Zorach* also addresses encouragement: "When the state encourages religious instruction . . . it follows the best of our traditions." These words first appeared in *Zorach*, 343 U.S. at 313-14 (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in whole or in part in eleven other Supreme Court opinions.[4]

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[4] *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of*

II. THE SCRAP TIRE GRANT PROGRAM DOES NOT IMPLICATE ANTIESTABLISHMENT CONCERNS; RATHER IT VIOLATES TRINITY LUTHERAN'S FREE EXERCISE AND EQUAL PROTECTION RIGHTS.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgment to accommodation to encouragement this Court might place the Scrap Tire Grant Program, the Program does not constitute establishment under the Framers' principles.

In fact, in some ways, it is hard to place the Program on the continuum. As noted the only recognition is negative "recognition." Further, and again as noted, an argument can be made that the program accommodates the religion of some, but that is a rather attenuated argument. And one could argue that the Program encourages religion. However, to make that argument, one would have to use the word "encourage" in a different sense than its historic use.

As demonstrated, historically, encouragement involved direct assistance to religion, often including financial assistance to whatever religious organization had "boots on the ground." However, such practices did not constitute an establishment of religion in that they did not reach even Justice Story's mildest form of establishment in which "a government affords aid to a particular religion, leaving all persons free to

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New York, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

adopt any other." Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

By comparison, if one used the word "encourage" with regard to the Program, one would have to say something like, "If Trinity Lutheran receives a grant, it might encourage some parents to send their children to The Learning Center, and if the children go to The Learning Center, they might be exposed to religious teaching that they would not encounter anywhere else." This, of course, is nothing like the government helping to pay for priests or churches or endowing an evangelistic association because it believes religion is "necessary to good government."

In fact, these two different uses of the word "encourage" also help to show that no Establishment Clause concerns are present. This Court has already rejected the argument that parents being encouraged to send their children to religious schools implicates antiestablishment concerns. Significantly, the argument was rejected in the context of a program designed to increase student safety, just as the Scrap Tire Grant Program is designed to do:

> [W]e cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Moreover, state-paid

> policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 17-18 (1947).[5]

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[5] Your *Amicus* is aware of the distinction between cases concerning whether a state *may* extend benefits and cases concerning whether a state *must* offer a benefit. However, Trinity Lutheran has ably briefed this distinction. More importantly, the point for which the above quotation is used is not lessened by this distinction.

Thus, this form of indirectly "encouraging" parents to send their children to a Catholic school—or here, Trinity Lutheran—raises no antiestablishment concerns. And, in turn, this Court relied on *Everson* in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976) for the proposition that "[i]f this [i.e., "incidental[ly] . . . facilitating religious activity"] were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."

Bearing in mind that this is the analogy this Court's majority *did* employ in *Everson*—given the facts as it believed them to be—it is also instructive to note the objections to this analogy made by Justice Jackson, writing for the four dissenters. Justice Jackson saw the facts differently. He believed that the program allowed reimbursements to *only* those parents whose children were enrolled in public schools and Catholic parochial schools. *Id.* at 21 (Jackson, J., dissenting). Under this view, Justice Jackson criticized the analogy as follows:

> It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask be-

> fore he renders aid 'Is this man or building identified with the Catholic Church.' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

Id. at 25-26.

Thus, the *Everson* majority and the *Roemer* plurality teach that *where a program of aid is opened to all those similarly situated*, 1) there is no antiestablishment concern over indirectly "encouraging" parents to choose religious schools and 2) that absurd consequences result when the opposite stance is embraced. On the other hand, the *Everson* minority teaches that *when the program discriminates on the basis of religion*—which is exactly what the Scrap Tire Grant Program does—"it [is] pretty plain that such a scheme would not be valid." *Id.*

These are two sides of the same coin, but it is

helpful to see the Scrap Tire Grant Program for what it is. The laughable strawman has indeed become the straight-faced enactment.

This Court should "not sustain an Act," *id.*, that provides scrap rubber to "public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies"[6] but not to Trinity Lutheran's Learning Center's daycare and preschool.

CONCLUSION

For the foregoing reasons and for other reasons stated in Trinity Lutheran's Brief, this Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,
this 21st day of April, 2016,

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

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[6] Pet'r Br. 1a (*Missouri Department of Natural Resources Publication 2425*).